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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A. D. 1940

**No. 415**

DOROTHY E. ROETTER,

*Petitioner,*

*vs.*

FRANK M. McKEY, TRUSTEE OF THE ESTATE OF  
BURT LEOPOLD ROETTER, BANKRUPT,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT  
THEREOF.**

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.**

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*To the Honorable Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

MAY IT PLEASE THE COURT:

The petitioner, Dorothy E. Roetter, respectfully represents to this Honorable Court:

**A.**

**Summary Statement of the Matter Involved.**

The respondent, Frank M. McKey, Trustee in Bankruptcy of the Estate of Burt Leopold Roetter, bankrupt, filed a plenary suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, to set aside, as in fraud of creditors, certain transfers

of personal property made by the bankrupt to the petitioner—his wife—several years before the filing of the Petition in Bankruptcy. The petitioner (whose husband was not joined as a defendant in the suit) filed her answer, denying the allegations of fraud and affirmatively setting forth that the property in issue was transferred to her for a good and valuable consideration, since executed. Upon the trial the petitioner made a motion, at the close of the respondent's evidence, to dismiss the Complaint on the ground that no case of fraud had been made out against her, which motion was allowed; and on December 18, 1939, a decree was entered dismissing the cause for want of equity (R. 152, 153). On appeal therefrom by the respondent, the United States Circuit Court of Appeals, in an opinion rendered on July 3, 1940, reversed the decree with directions to the District Court to take further proceedings in harmony with the opinion (R. 179-183). On August 8, 1940, said Circuit Court denied petitioner's Petition for Rehearing (R. 267), and on August 13, 1940, entered an order staying the mandate for thirty days, in accordance with Rule 25 of said Court (R. 276).

The respondent's Complaint, which invoked jurisdiction under Section 70E of the Bankruptcy Act, alleged, in substance, that Burt Leopold Roetter (who was adjudicated a bankrupt on December 15, 1938) (R. 180) did on, to-wit: May 22, 1934, transfer to the petitioner certain stocks, bonds and other securities, which transfers rendered him insolvent and were made without a good or valuable consideration, and for the purpose of "concealing assets and hindering, delaying and defrauding creditors" (R. 5). It also alleged that on, to-wit: September 6, 1938, a judgment for Twenty Thousand Two Hundred and 00/100 (\$20,200.00) Dollars was rendered against the bankrupt in the Superior Court of Cook County, Illinois, in a suit (R. 5) which, the plaintiff's motion for summary judgment shows, was instituted in June, 1932, to establish his liability as a stockholder of the Chicago Bank of Commerce (R. 21); and



the respondent claimed that the transfers of property in controversy were intended to evade such liability. The Complaint further alleged that at the time of the filing of the Petition in Bankruptcy in December, 1938, the bankrupt had virtually no assets and that his liabilities amounted to Twenty Thousand Three Hundred and 00/100 (\$20,-300.00) Dollars (R. 5).

The answer of the petitioner denied that the property was transferred to her at a time when the bankrupt had creditors to whom he was indebted; and denied that the same was transferred to her without any good or valuable consideration, or with a fraudulent intent; and it affirmatively set forth that the bulk of the securities were transferred to her not in May, 1934, as the Complaint alleged, but over a period of years, from 1928 to 1930, pursuant to an agreement or understanding entered into between her husband and herself shortly after their marriage in 1928 (at a time when he had no creditors or indebtedness of any kind); that the agreement provided that in consideration of such transfers of property as her husband would make to her from time to time during their married life, she would provide, from the principal and income thereof, for the support and education of children born to them, and also for the support of her husband's mother, whom he had previously supported; and that the petitioner has fulfilled, and is still fulfilling, said agreement (R. 13-14). It further alleged that petitioner's husband kept the property transferred to her in his safety deposit vault until May, 1934, when he turned over the *physical* possession thereof to her (R. 10-12); and that she had no knowledge of his financial affairs or alleged liabilities until October, 1938, when an execution on the judgment aforesaid was served upon him (R. 11-12).

Upon the trial the respondent called the petitioner as a witness and she testified that shortly after their marriage in April, 1928, her husband said to her: "Dorothy, I

want you to have some stocks and bonds that I have and I want you to maintain the household and any children that are to be born and my mother. I have always supported her" (R. 81). The bankrupt, who was also called as respondent's witness, gave corroborating testimony as follows: "I told her that I was transferring these securities over to her with the understanding that she was to see my mother amply provided for, and that she knew I had taken care of her ever since I was in my early teens, and also to take care of herself and any children that were born to us" (R. 109). Petitioner further testified that children were born of said marriage in February, 1932, and October, 1933; that various stocks, bonds and securities were transferred (though not physically turned over to her) during the period 1928 to 1930, inclusive; that these were kept in her husband's safety deposit box at her request (R. 79-84); that written lists, marked respectively "Burt" and "Dot," were drawn to indicate their respective holdings; and that the physical possession of said property was delivered to her in May, 1934, when she procured a safety deposit box of her own (R. 94). It was not contended by the plaintiff, nor does the opinion of the Circuit Court of Appeals find, that the bankrupt had any creditors at any time prior to 1932 (R. 231-6); and the date of the alleged indebtedness is fixed by the plaintiff as being June 25, 1932 (R. 21).

Petitioner further testified that while here husband collected the income from the securities transferred to her prior to May, 1934, he turned it over to her, and she in turn expended some \$4,000.00 annually, over a number of years, in fulfillment of the agreement aforesaid (R. 85-87); that no part of the income or principal of the transferred securities was given to or used to support the bankrupt (R. 113); and that she has continued to retain possession of said property as the bona fide owner thereof to the present time (R. 77).

With respect to the bankrupt's financial condition in *May, 1934*, when, it is alleged, the delivery of the property in issue took place, the evidence is that the bankrupt retained an aggregate of Nineteen Thousand and 00/100 (\$19,000.00) Dollars in stocks or bonds and cash (R. 116-118), and no evidence was adduced by the respondent to show that the petitioner held the property transferred to her as a secret trustee for the bankrupt; nor was it shown that she had any knowledge of her husband's financial affairs or alleged liability of any character, when she received the securities in question. It was not shown or contended that the petitioner was given any stock of the Chicago Bank of Commerce, or that she otherwise knew that her husband was a stockholder of the bank. It was not shown or contended that when said securities were transferred to the petitioner, her husband intended to file a Petition in Bankruptcy or that if he had such intention, the petitioner was aware thereof.

In allowing the motion to dismiss the Complaint at the close of the respondent's evidence, the trial judge said:

"This is a law suit which is filed against Dorothy E. Roetter, Northwestern Mutual Life Insurance Company, Central Life Insurance Company and United States Gypsum Company. There has been a lot of evidence introduced here which seems to apply with great particularity to the husband of Dorothy E. Roetter, but I haven't heard anything yet which indicates to me that the relief prayed for in this Bill of Complaint as against this defendant, Dorothy E. Roetter, should be granted. I don't think the equities are with the Complaint in this case under the evidence which has been submitted to this Court. Therefore, your motion will be allowed. You may prepare the proper decree." (R. 148.)

In reversing the decree herein, the opinion of the Circuit Court of Appeals does not find that the bankrupt actually

intended to defraud creditors, or that the petitioner knowingly participated in any such intent; or that the petitioner held or holds said property as a secret trustee for the bankrupt. It finds that the transfers of property herein were voluntary, and that the bankrupt did not retain sufficient property to meet his "debts"; that it was not incumbent upon the respondent to prove that the petitioner knowingly participated in any actual intent to defraud creditors; and that the transfers of property must conclusively be presumed to be fraudulent *as a matter of law*, regardless of the petitioner's actual intentions. (See Opinion, R. 179-183.)

In her Petition for Rehearing petitioner urged, *inter alia*, that assuming the Circuit Court of Appeals was justified in reversing the decree herein, it should have remanded the cause for re-trial to permit her to offer evidence of her defense, in accordance with the provisions of Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States (R. 211-212). The Petition for Rehearing afforded petitioner the first opportunity of raising this question, as she could not reasonably anticipate that the Circuit Court of Appeals would reverse the decree without remanding the cause for re-trial.

## B.

### Jurisdiction.

1. *Statutory Jurisdiction.* The statutory jurisdiction of the Supreme Court of the United States to review by certiorari the judgment of the United States Circuit Court of Appeals, entered herein, is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

2. *Date of Judgment Sought to be Reviewed.* The judgment of the United States Circuit Court of Appeals herein

was entered on July 3, A. D., 1940 (R. 179). Petition for Rehearing was denied on August 8, A. D., 1940 (R. 267). This Petition for a Writ of Certiorari is presented within the period of three months from said date, as required by Section 8 of the Judicial Code, as amended by the Act of February, 1925.

### C.

#### Questions Presented.

The questions presented are:

1. In a plenary suit by a trustee in bankruptcy against the bankrupt's wife, to set aside, as in fraud of his creditors, a transfer of property made by him to her, is it necessary to prove that she, as the transferee, was knowingly a party to an actual intent to defraud his creditors, where the issue, as made by the pleadings, is one of actual fraud?

2. (a) Where in such plenary suit it is claimed that at the time of the transfers of property there was a suit pending against the bankrupt to establish his liability as a shareholder for the debts of a closed bank, was this sufficient proof of an existing indebtedness at the time of such transfers?

(b) Where the liability of the bankrupt for the debts of the bank was *subsequently* established, by the entry of a judgment, was this sufficient to sustain the allegation that the transfers of property, which took place several years before the entry of the judgment, were fraudulent, in the absence of proof that the wife held the property as a secret trust for the bankrupt?

(c) Was the liability (as distinguished from the judgment subsequently rendered thereon) of the bankrupt, as a shareholder of the closed bank, a provable claim in

bankruptcy so as to constitute the creditors of the bank creditors of the bankrupt within the meaning of the Bankruptcy Act, under which Act the jurisdiction in the plenary suit was invoked?

3. Where the transfers of property in controversy were made pursuant to an agreement between the bankrupt and his wife, entered into shortly after their marriage when he had no indebtedness of any kind, in consideration of which agreement the wife undertook, out of the income or principal of said property, to support the bankrupt's mother and also to support such children as might be born of the marriage; and where children were subsequently born of said marriage and the wife actually fulfilled, and is still fulfilling, said agreement, were such transfers of property voluntary, or were they based upon a good and valuable consideration?

4. Assuming said transfers of property, as set forth in No. 3, to be voluntary, and made at a time when the husband was in failing circumstances, is the presumption of fraud in the case of such transfers one of fact or one of law?

5. Is the fact that a husband, after transferring property to his wife, continues to retain physical possession and to exercise control thereof, at her request, inconsistent with her claim of ownership of such property?

6. Where the Circuit Court of Appeals reverses a decree of the District Court, dismissing a Complaint for want of equity after allowing the defendant's motion to dismiss said Complaint at the conclusion of the plaintiff's evidence, the Circuit Court of Appeals holding that said motion should have been denied, is the defendant entitled to have the cause remanded for re-trial to permit him to offer evidence of his defense, in view of the provisions of Rule

41(b) of the Rules of Civil Procedure for the District Courts of the United States?

Said Rule 41, Paragraph (b), provides in part as follows:

“After the plaintiff has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.”

#### D.

##### Reasons for Granting Writ of Certiorari.

1. The decision of the Circuit Court of Appeals that it was not necessary for the respondent (plaintiff below) to prove that the petitioner (defendant below) knowingly participated with the bankrupt in an actual intent to defraud his creditors is in conflict with the applicable decisions of the State of Illinois in the following cases: *Albers v. Smiley*, 300 Ill. App. 66 (72); *Ayers Nat. Bank v. Barber*, 287 Ill. 182 (187-188).

It is also in conflict with the comparatively recent decision of the Circuit Court of Appeals in the case of *Marshall v. Gelfand*, 99 Fed. (2d) 85 (86, 87).

2. (a) The opinion of said Circuit Court of Appeals that the transfers of property in controversy “were made at a time when the bankrupt was indebted in excess of his retained assets” is in conflict with the principles announced in the following Illinois cases: *Bittinger v. Kasten*, 111 Ill. 260 (264); *Mundell v. Craven*, 267 Ill. App. 447 (451); and *Knowles v. Crow*, 289 Ill. App. 108 (112-113).

(b) The opinion of the Circuit Court of Appeals that it was sufficient if the liability of the bankrupt as a shareholder of the closed bank was established *subsequent* to



the transfers of property in issue herein is in conflict with the rule as announced in the Illinois decisions in: *Jones v. King*, 86 Ill. 225 (229); *Wojtas v. Rachel*, 267 Ill. App. 148 (157); and *National City Bank v. Cowdin*, 343 Ill. 430 (434); the opinion of the Circuit Court of Appeals in *Anderson v. Hultberg*, 247 Fed. 273 (277); and the opinion of this Honorable Court in *Horbach v. Hill*, 118 U. S. 144 (149).

(c) The opinion of the Circuit Court of Appeals to the effect that the plaintiffs in the suit to establish the bankrupt's liability as a shareholder of the bank were creditors of the bankrupt *before* such liability was established, raises the important question whether said plaintiffs were creditors within the meaning of the Bankruptcy Act, under which jurisdiction in the plenary suit was invoked. This question has not been passed upon by any Federal Court, and should be decided by this Court.

3. The finding of the Circuit Court of Appeals that the transfers of property herein were voluntary raises a new question as to the nature of the transfers here in controversy, which should be decided by this Court.

4. The opinion of the Circuit Court of Appeals that the transfers of property in issue must be conclusively presumed fraudulent *in law*, regardless of the actual intent of the bankrupt or the petitioner, is in conflict with the same Court's decision in the case of *Weld v. McKay*, 218 Fed. 807 (809-810); and with the Illinois decisions in the following cases: *McKenna v. Mickelberry*, 242 Ill. 117 (134); *Mitchell v. Fahler*, 210 Ill. App. 516 (517, 518); and *Kingman v. Mowry*, 182 Ill. 256 (261).

5. The finding of said Circuit Court of Appeals that the delivery of the property by the bankrupt to his wife took place in May, 1934, is in conflict with the decisions



of the Circuit Court of Appeals in the following cases: *Anderson v. Hultberg*, 247 Fed. 273 (277); *Epstein v. Goldstein*, 107 Fed. (2d) 755 (757); and with the Illinois rule in the following case: *Haskell v. Art Institute*, 304 Ill. App. 393 (404).

6. The construction of Rule 41(b) of the Rules of Civil Procedure for the District Court of the United States is involved. Whether a defendant is entitled to put in his defense, where the reviewing court in reversing a decree dismissing the Complaint at the close of the plaintiff's case holds that the "motion to dismiss" should have been denied, has not been passed upon by any Federal Court, and should be decided by this Court so that the rule may be clarified. The question also involves the element of "due process" as guaranteed by the Federal Constitution, which should be decided by this Court.

### **PRAYER.**

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, commanding said Court to certify to this Honorable Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 7206, *Frank M. McKey, Trustee of the Estate of Burt Leopold Roetter, Bankrupt, Plaintiff-Appellant, Armin F. Hillmer, et al., as representative creditors of Chicago Bank of Commerce as a class, Additional Parties Plaintiff-Appellant v. Dorothy E. Roetter, et al., Defendants-Appellees*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and

that the judgment herein, of said Circuit Court of Appeals for the Seventh Circuit, may be reversed by this Honorable Court, and for such other and further relief as to the Court may seem meet and just.

DOROTHY E. ROETTER, *Petitioner*

HARRY LEROY JONES,  
ARTHUR H. JONES,  
REUBEN FREEDMAN,

*Counsel for Petitioner.*

